EDITOR'S NOTE

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No. 98-9933

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL C. ANTONELLI — PETITIONER
(Your Name)

VS.

DALE CARIDINE, et al— RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[x] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court for the Northern District of Illinois,
Eastern Division Case # 97 CR 194 before the Honorable Jaon B Gottschal

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

x Michael C. Antonelli
(Signature)

98-9933

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Michael Antonelli, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes X No __

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Approx $20.00/month @ FCI, Greenville
Box 5000, Greenville, Il 62246

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes X No __ Gifts & Donations from friends & relatives totaling no more than $2,000 approximately in past year.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. Cannot recall exact dates, names & amounts.

3. Do you own any cash or have a checking or savings account? Yes __ No X

a. If the answer is yes, state the total value of the items owned.

N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes __ No X

a. If the answer is yes, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None At present

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: May 24, , 1999.

(28 USC Section 1746)

X Michael Antonelli
(Signature)

No. 98-9933

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL C. ANTONELLI — PETITIONER
(Your Name)

VS.

DALE CARIDINE, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the SEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL ANTONELLI, Pro Se # 04053-164
(Your Name)

Box 5000
(Address)

Greenville, Illinois 62246
(City, State, Zip Code)

None
(Phone Number)

98-9933
Antonelli

QUESTION(S) PRESENTED

1. Whether a district court can properly dismiss a claim of deliberate indifference to medical needs on the ground that the proper defendant was not named, when the same court denied discovery needed to reveal the name needed to state the claim ?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

DALE CARIDINE
CALVIN EDWARDS
PAGE TRUE
Mr HENRY
MICHAEL QUINLAN
Ms HARRIS
JOHN MAGNUSON

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STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 26, 1999.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT - Access to the Courts

FIFTH AMENDMENT - Due Process of Law

EIGHTH AMENDMENT - Cruel and Unusual Punishment

STATEMENT OF THE CASE

On August 2, 1991, Petitioner was assaulted by a Deputy United States Marshal in the federal building in Chicago. He suffered from a concussion and his body was bruised and battered and he had a laceration on the back of his head which was bleeding ultimately leaving a ½ inch scar. He was then brought to the Metropolitan Correctional Center in Chicago. He was interviewed by Unit Manager JOHN MAGNUSON. Magnuson knew of the injury and did nothing. Later in the evening he was seen by a resident Physician's Assistant and told he could get some aspirins when he ultimately was assigned a unit. When assigned to a Unit, he was forced to sleep in an upper-bunk. DALE CARIDINE and JOHN MAGNUSON refused a lower bunk. Petitioner vomited and could not eat. Petitioner was harrassed by MAGNUSON and CARIDINE. He never got to see a doctor for days. When he did, he was told he suffered a concussion. Petitioner signed up for "sick call" everyday. Because the policy custom and practice at MCC (sic) was that those sick had to be awake when "sick call" was conducted, petitioner failed to see a doctor for 5 days. He was too sick to wake up. DALE CARIDINE later harrassed petitioner and had confiscated petitioner's legal papers. He refused to return tham and advised petitioner there was nothing he could do about it.

Petitioner filed suit in federal court. He alleged that the "sick call" procedure at MCC was unconstitutional. He alleged harassment by MAGNUSON and CARIDINE and Warden PAGE TRUE's knowledge of the unconstitutional policy, custom and practice denying petitioner his rights. He alleged CARIDINE had denied him access to the courts.

CARIDINE and MAGNUSON were the only defendants left after the first round of dispositive motions. (Appendix D) The Warden was dismissed. The second round brought dismissal of CARIDINE and MAGNUSON as to the Eighth Amendment claims. (Appendix C) CARIDINE was ultimately dismissed as to the Access to the Courts claims. (Appendix B) Petitioner was denied access to discovery and could never air his claims of unconstitutional policy, custom and practice because he could never 4. find out the Physician Assistant's name.

REASONS FOR GRANTING THE PETITION

Petitioner brought the case to the SEVENTH CIRCUIT. He stated that the district court erred in dismissing Warden PAGE TRUE as to the unconstitutional medical policy's, custom and practice. (they still exist to this day at MCC Chicago) He specifically alleged that the court erred in denying his discovery motion to compel production of the name of the Physician's Assistant "mainly" responsible for the denial of medical treatment. (in conjunction with the denials by CARIDINE and MAGNUSON)(the Seventh Circuit brings out a circular argument exculpating CARIDINE and MAGNUSON because petitioner used the word "mainly" to delineate the Physician's Assistant's constitutional deprivations) HE alleged error in dismissing MAGNUSON and CARIDINE's indifference. He alleged CARIDINE's denial of access to the courts claim should not have been so rudely dismissed.

The medical staff at MCC Chicago has long been grossly incompetent, inadequate and has excessively violated the Eighth Amendment enough to shock the conscience of the courts. The medical treatment there is intolerable. It is fundamentally unfair. The problem is, almost nobody knows how to litigate this and bring it to the attention of the courts. So it goes on, and on, and on. It goes on to this very day. Same can be said of the constant harassment by staff. This is deliberate indifference.

The main gist of petitioner's issue herein will be narrowed to the dismissal of the claim that the Metropolitan Correctional Center has a blatant unconstitutional policy, custom and practice of denying those medical care who simply are too sick to wake up in the morning after having signed the sick-call ledger the night before. That is how petitioner ended up not being seen by a doctor for five-days. The initial Physician's Assistant contact also could not be litigated solely because the district court denied him the discovery needed to develope these claims.

Only in a world of Kafka would a court dismiss a claim that a litigant failed to name the defendant, after having denied the same litigant the discovery needed to obtain the name needed to properly state his claim. Similarly, only in a world of Kafka could a sick prisoner be expected to appear at the "sick call" when in fact he was too sick to appear in the firstplace. See **Valona v United States Parole Commission**, 165 F 3d 508 (7th Cir 1998)

Litigants need not plead legal theories and district judges should afford the relief to which the prevailing party is entitled without regard to errors in the pleadings. **Valona**, **supra**.

Petitioner never found out the name of the Physician's Assistant who was responsible for treating him for the concussion. He also never was allowed to pursue his claims that the policy, custom and practice at MCC are unconstitutional.

Petitioner states that this Court should grant this petition to right these wrongs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Michael Antonelli

Date: May 24, 1999

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 22, 1999*

Decided February 26, 1999

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. John L. Coffey, *Circuit Judge*

Hon. Ilana Diamond Rovner, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 96-2877

MICHAEL C. ANTONELLI,
Plaintiff-Appellant,

v.

DALE CARIDINE and JOHN MAGNUSON
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 93 C 4385

David H. Coar, *Judge.*

ORDER

Michael C. Antonelli, a federal prisoner, appeals pro se the district court's grant of summary judgment to the defendants in his *Bivens* action, alleging that medical treatment he received at the Metropolitan Correctional Center ("MCC") in Chicago, Illinois violated the Eighth Amendment and that the seizure by MCC personnel of papers from his prison cell violated the Fourteenth Amendment. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). We affirm.

After violating his federal parole, Antonelli was arrested on August 2, 1991. While being

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a).

A

processed for incarceration by a deputy marshal at the Dirksen Federal Building in Chicago, Antonelli became involved in an altercation during which he suffered a cut to his head and some bruises on his body. He vomited en route to the MCC. When he arrived at the MCC, Antonelli complained of having a headache and experiencing dizziness and nausea. His intake interview was conducted by Unit Manager Jon Magnuson, who referred him to medical staff and assigned him to an upper bunk because no lower bunk was available. During his examination by a member of the MCC medical staff, Antonelli again complained of headaches, dizziness, and nausea.

About a month after Antonelli arrived at the MCC, Correctional Officer Dale Caridine took some legal papers from Antonelli's locker. He told Antonelli that the papers "were taken for investigation." Although Antonelli subsequently could not identify what papers had been confiscated, he claimed that some of them were his personal legal papers and others were legal papers he was preparing for another inmate.

In July 1993, Antonelli filed with the district court a 10-count complaint against seven employees of Chicago's Metropolitan Correctional Center in both their personal and official capacities–then MCC Warden Page True, True's predecessor MCC Warden Mark Henry, Regional Director of the Federal Bureau of Prisons ("BOP") Calvin Edwards, Director of the BOP Michael Quinlan, an MCC correctional officer surnamed Harris, Officer Caridine, and Unit Manager Magnuson. Antonelli alleged a host of violations of his constitutional rights, ranging from unconstitutional denial of medical care and seizure of legal papers to improper interference with his mail and the denial of a visit by his girlfriend. He sought compensatory and punitive damages, as well as an injunction to prevent the unconstitutional actions from further reccurring at the MCC.

The district court dismissed seven of the counts. The remaining counts were as follows: a count against Magnuson and Caridine for deliberate indifference to Antonelli's medical needs; a count against Caridine for improperly seizing papers from Antonelli's locker; and a count charging common law negligence against the United States for the medical care which Antonelli received from the MCC. The remaining parties--Magnuson, Caridine, and the United States--conducted discovery relating to the three counts. When defendants did not turn over the documents requested by Antonelli--e.g. names of government employees, his administrative remedies files with the BOP, his arrest records--Antonelli moved to compel discovery. The court denied the motion without explanation.

Magnuson, Caridine, and the United States moved for summary judgment on the three remaining counts. The district court granted summary judgment on the two counts alleging improper medical care; the court found that Antonelli's evidence was insufficient to show that Caridine and Magnuson were deliberately indifferent to his medical condition. The court noted, for instance, that Antonelli was seen by a member of the MCC's medical staff on the same day as his arrival at the MCC. The court, however, denied summary judgment on the count charging unlawful seizure of papers. The court pointed out that although a post-deprivation institutional remedy existed, no evidence was produced that Antonelli knew of its existence. The court determined that Antonelli had

not been notified in accordance with prison policy: he had not been provided with an inventory of the seized articles, the MCC had not apprised him of its seizure and recovery policies, and he had not been informed of the prison's post-deprivation recovery procedure.

Officer Caridine then moved to vacate the judgment on the third count. He argued that Antonelli did not need to actually know of the existence of the BOP's deprivation remedy; it was the existence of an adequate remedy that mattered. The district court agreed, finding that Antonelli had a post-deprivation remedy under the Federal Tort Claims Act--a remedy which Antonelli had acknowledged but chose not to exercise. Finding that Antonelli knew about the FTCA, the court vacated its order and entered summary judgment on the count alleging unlawful seizure of papers.

On appeal, Antonelli first argues that the district court erred in dismissing Warden True from his *Bivens* action because the complaint adequately alleged the Warden's personal involvement. Antonelli points out, for instance, that he alleged that Warden True negligently hired, trained, and supervised Caridine and Magnuson, and that True oversaw the implementation of what Antonelli refers to as the MCC's "unconstitutional policy, custom and practices regarding sick call procedures." But as we noted in an earlier case involving Antonelli, a prison official bears no liability for a prisoner's constitutional claims if his liability is attributed to him on account of the doctrine of respondeat superior. *See Antonelli v. Sheahan*, 81 F.3d 1422, 1428 (7th Cir. 1996). In the present case, Antonelli fails to allege that Warden True had any personal or direct involvement in Antonelli's MCC custody or medical treatment. Although Antonelli alleged generally that True oversaw an unconstitutional sick call policy, Antonelli does not allege that the Warden participated directly in the day-to-day implementation of that policy. Liability is plausibly attributed to a higher official only if he is shown to "actually have participated in the constitutional wrongdoing." *See Del Raine v. Williford*, 32 F.3d 1024, 1037 (7th Cir. 1994).

Antonelli next argues that summary judgment on his Eighth Amendment claim was improper because Magnuson and Caridine were deliberately indifferent to his medical condition and because the MCC failed to administer "proper medical attention" to the concussion he claims he received as a result of the altercation at the Federal Building. Antonelli contends that his concussion was manifestly serious and required immediate medical attention from the MCC staff; consequently, he reasons the delay in his treatment reveals the deliberate indifference of Caridine and Magnuson. Since Antonelli failed to file a response to defendants' Local Rule 12(m) Statement of Uncontested Facts, however, we treat those facts as uncontroverted. *See* U.S. Dist. Ct. N.D. Ill. R. 12(N); *Corder v. Lucent Tech., Inc.*, 163 F.3d 924, 927 (7th Cir. 1998). Thus, we accept as true defendants' assertions that Antonelli received continued and reasonably prompt treatment of his ailments; that Magnuson performed Antonelli's intake; and that Antonelli was examined and treated for his head ailments by MCC medical staff later on the day of his intake and on three other occasions within a month of his entry. Beyond merely alleging that Caridine "was plain ignorant" and gave Antonelli a "hard time," Antonelli does not establish that Caridine acted to aggravate or ignore his medical needs. Thus, Antonelli cannot show that either Magnuson or Caridine was deliberately indifferent to his medical needs. Nor can he show that Magnuson or Caridine, and the MCC violated his constitutional rights

by not responding to his request that he be assigned to a lower bunk to sleep. *See Williams v. Ramos*, 71 F.3d 1246, 1251 (7th Cir. 1995).

Next, Antonelli argues that the district court erred when it granted summary judgment to Caridine on the count regarding the unauthorized confiscation of his papers. He claims that the MCC's seizure of the papers denied him access to the courts and also violated his procedural due process rights. But in his appellate brief, Antonelli admits that he was able to "reconstruct" the missing records. By his own acknowledgment, Antonelli thus concedes that he has not suffered actual injury and that he was not denied access to the courts. Since Antonelli fails to allege an actual injury, he fails to state a claim of denial of access to the courts. *See Lewis v. Casey*, 518 U.S. 33 (1996); *Hains v. Washington*, 131 F.3d 1248, 1249 (7th cir. 1997). Further, since a meaningful post-deprivation remedy exists for him, Antonelli fails to successfully allege a due process violation. *See Zinermon v. Burch*, 494 U.S. 113, 125-126 (1990); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). As the district court rightly discerned, even if Antonelli was unaware of the MCC's post-deprivation procedures, he had another viable post-deprivation remedy open to him--the Federal Tort Claims Act. *See Del Raine*, 32 F.3d at 1046.

Finally, Antonelli argues that the district court erred in denying his motion to compel production of certain documents that he claims he needed to successfully rebut defendant's summary judgment motion. We review the court's decisions regarding discovery for abuse of discretion. *See Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1171 (7th Cir. 1998). We will not disturb the district court's exercise of discretion, however, unless Antonelli has established that the denial of the requested discovery resulted in "actual and substantial prejudice" to him. *See Jurcev v. Central Comm. Hosp.*, 7 F.3d 618, 627 (7th Cir. 1993). This he has not done. He argues only that what the defendants produced was "superficial" and laments that he had been unable to discover the name of the physician's assistant "mainly responsible for the non-treatment of the concussion." This argument implicitly acknowledges that Caridine and Magnuson were not "mainly responsible" for the "non-treatment" of his ailment, and that he blames an unidentified assistant rather than the defendants for failing to treat him. Thus, the requested information would not have bolstered his efforts to demonstrate deliberate indifference to his medical problems on the parts of Caridine and Magnuson. Accordingly, the district court did not abuse its discretion in setting limits on discovery.

The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL C. ANTONELLI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	93 C 4385
	)	
OFFICER CARIDINE, et al.	)	Judge David H. Coar
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Defendant Caridine requests that this court vacate its order denying summary judgment on count III of Antonelli's complaint. Count III involves the alleged seizure by Caridine of Antonelli's legal papers during a shake-down at the Metropolitan Correctional Center. *See* Antonelli v. Caridine, No. 93 C 4385, 1995 WL 723767 (N.D.Ill. Dec. 1, 1995) (Coar, J.). Citing the Supreme Court's decision in *Hudson v. Palmer*, this court acknowledged in that opinion that the unauthorized intentional deprivation of property by a state employee does not violate the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. 486 U.S. at 533, 104 S. Ct. at 3204. The court further acknowledged that the Metropolitan Correctional Center has a post-deprivation procedure for recovery of non-contraband personal property seized during a shake-down. The court nevertheless denied summary judgment because Caridine failed to establish that Antonelli knew or had reason to know of the prison's post-deprivation procedure. The court's concern was very basic: if Antonelli did not know of the MCC's post-deprivation procedure, how could it be established on a Rule 56 motion that he had access to a *meaningful* post-deprivation remedy? The outcome certainly

B [redacted]

would have been different if the record established that Antonelli knew about the MCC post-deprivation procedure but nevertheless decided not to seek any relief under it. The facts presented to the court thus far show, however, that this is not the case. Antonelli testified in his deposition that despite his repeated requests to have his property returned, Caridine never informed him of the procedures that he needed to follow to reclaim his seized property. (Whether Caridine or any other prison guard, agent, or employee informed or failed to inform Antonelli of the MCC's procedure was an open question reversed for resolution at trial.)

In the present motion, Caridine argues that it does not matter whether Antonelli knew of the prison's post-deprivation procedure; rather, he argues that the "it is the mere availability of a post-deprivation procedure that satisfies the due process requirement." This argument is unpersuasive. Under defendant's reasoning, an available but grossly inadequate post-deprivation proceeding would satisfy due process. Whether a post-deprivation procedure exists is necessarily subsumed within the broader question of whether the post-deprivation procedure provides a *meaningful* remedy. The mere existence of a post-deprivation procedure is not, without more, sufficient to satisfy due process. The focus is necessarily on the *adequacy* of the post-deprivation procedure. Accordingly, this court rejects Caridine's first contention.

Caridine now argues for the first time that Antonelli's post-deprivation remedies for the seizure of his legal papers were not limited to those provided by prison regulations. Rather, Caridine argues that Antonelli also had an adequate remedy under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2761 *et seq.*, for conversion or negligent removal. As such, Caridine argues that the availability of this tort remedy satisfies due process, *citing*

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Zinermon v. Burch, 494 U.S. 113, 128, 110 S. Ct. 975, 984 (1990) ("[i]n some circumstances . . . a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process").

Where a federal statute or common-law tort provides an adequate remedy for a deprivation of property, a claim for section 1983 liability "necessarily fails." Cushing v. City of Chicago, 3 F.3d 1156, 1164 (7th Cir. 1993); Del Raine v. Williford, 32 F.3d 1024, 1046 (7th Cir. 1994) (FTCA provided adequate post-deprivation remedy for a claim concerning the loss of certain dictionaries confiscated from a prisoner); *accord* Hudson, 468 U.S. at 530-34, 104 S. Ct. at 3202-04; Stewart v. McGinnins, 5 F.3d 1031 (7th Cir. 1993), *cert. denied* 114 S.Ct. 1075 (1994). The facts in Hudson and Stewart are closely analogous to those at issue here. In Hudson, a prisoner incarcerated by the Commonwealth of Virginia filed a section 1983 claim against Hudson, a prison guard, alleging that Hudson had deprived him of certain property without due process of law. The prisoner claimed that Hudson had intentionally destroyed several articles of noncontraband property (including legal papers) belonging to the prisoner after Hudson seized the property during a shakedown search of the prisoner's cell. The Supreme Court concluded that the prisoner's due process rights were not violated because the Commonwealth of Virginia provided him with an adequate postdeprivation remedy; namely, state law tort claims for conversion or detinue. Id. at 520 n.1 & 535, 104 S. Ct. at 3197 n.1 & 3024. In Stewart, several prison guards threw away personal property confiscated from a prisoner's cell at Stateville Correctional Center during two shakedown searches. The seized and destroyed property including a pair of blue jeans, an electric fan and legal papers. The court found that the guards failed to follow established procedures in conducting the searches, including their failure to issue a shakedown slip to the

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prisoner listing all of the confiscated property. The court nevertheless concluded, however, that the prisoner's "due process rights were not violated when Stateville officers confiscated and destroyed his property in violation of IDOC regulations" because Illinois provided an adequate postdeprivation remedy; namely, the prisoner could file a tort claim in the Illinois Court of Claims. Id. at 1036.

In this case, Antonelli (a prisoner/litigator well versed with the FTCA) concedes that he could have filed a tort claim "if he wanted to" and thus does not challenge Caridine's contention that the FTCA provides an adequate post-deprivation remedy. (Pl. Resp., at ¶2). Based upon this concession and the governing case law, the court hereby concludes that Antonelli's section 1983 claim must fail.

WHEREFORE, for the foregoing reasons, Caridine's Motion to Vacate this court's order denying summary judgment on Count III is granted. Summary judgment is hereby entered in Caridine's favor on Count III.

ENTER:

David H. Coar,
U.S. District Judge

Dated: May 30, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL C. ANTONELLI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	93 C 4385
	)	
OFFICER CARIDINE, et al.	)	Judge David H. Coar
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the court on the defendants, United States of America, Dale Caridine ("Caridine") and John Magnuson's ("Magnuson") Motion for Summary Judgment on the remaining counts of plaintiff, Michael C. Antonelli's ("Antonelli") complaint.[1] For the reasons set forth, the motion is granted in part and denied in part.

The relevant facts in this case are undisputed since Antonelli failed to file a response to the defendants' Local Rule 12(m) Statement of Uncontested Facts.[2] *See* Local Rule 12(N)

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[1]Judge James F. Holderman previously dismissed all counts of plaintiff's ten count complaint, except Counts II and VI against Caridine and Magnuson and Count III against Caridine. *See* Mem. Op. & Ord., Sept. 22, 1994 (Holderman, J.), as modified by Ord. of Sept. 27, 1994 (Holderman, J.). The United States, which substituted in as a party defendant, is sued in count VI under the Federal Torts Claim Act, 28 U.S.C. §2671 *et seq.* *See* Ord. of Dec. 6, 1993 (Holderman, J.). Count II alleges that the defendants were deliberately indifferent to Antonelli's medical condition in violation of his constitutional rights. Count III alleges that Caridine illegally seized certain legal papers held by Antonelli. Finally, Count VI alleges that the defendants negligently failed to provide Antonelli with medical treatment.

This case was reassigned to this court following my appointment to the bench in November 1994.

[2]The defendants attached to their Memorandum in Support of Defendants' Motion for Summary Judgment the required Rule 56 cautionary instructions and warnings. *See* Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982).

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("All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party."); Johnson v. Gudmusson, 35 F.3d 1104, 1108 (7th Cir. 1994) (all material facts contained in movant's uncontested 12(m) statement were accepted as true).

I. Facts

Caridine and Magnuson, both of whom are sued in their individual capacities, are employees of the Federal Bureau of Prisons and are assigned to the Metropolitan Correctional Center ("MCC") in Chicago, Illinois. (12(m), at ¶3).

On August 2, 1991, Antonelli was arrested by the Hickory Hills, Illinois police department pursuant to a federal parole violator warrant. (12(m), at ¶7). Later that day, Antonelli was involved in an altercation with a United States Deputy Marshal while he was being processed for incarceration by the United States Marshals Service. During this altercation, Antonelli suffered a cut on his head. (*Id.* at ¶8). Antonelli claims that he became sick -- symptoms included nausea, dizziness and a headache -- and vomited at the Marshals Service.[3] (Antonelli Dep., at 5-6). He was subsequently transported to the MCC, where he again vomited. (*Id.* at 7). He was then interviewed by Magnuson. (12(m), at ¶9). He was assigned an upper bunk at his intake procedure as there were no lower bunk berths available on his floor. (*Id.* at ¶11). Later that day, Antonelli was seen by a member of the

[3]The record does not address the cause of the onset of these symptoms; namely, whether they were the consequence of the alcohol and cocaine Antonelli had consumed between the afternoon of August 1, 1991, and the 7:00 a.m. on August 2, 1991, or whether they resulted from the altercation with the Deputy Marshal. *See* 12(m), at ¶1; Antonelli Dep., at 5. At the time of his arrest, Antonelli described the extent of his intoxication as "illegal to drive," *see* Antonelli Dep., at 13, which may have been a conservative estimate.

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CC's medical staff. He complained of headaches, dizziness, and nausea. (*Id.* at ¶10). He requested Tylenol for his headache. (*Id.*). He was told that he could get aspirin at his unit. (Antonelli Dep., at 15).

Antonelli was again seen by the MCC medical staff at the sick call on August 6, 1991. (12(m), at ¶12). He complained of a headache but did not complain of dizziness or nausea. (*Id.*). He was given Motrin. (*Id.*). He also requested that the medical staff assign him a lower bunk because climbing into the upper bunk aggravated his headache. (*Id.* at ¶13).

On August 9, 1991, Antonelli was again seen at the sick call. The medical staff approved his request for a refill of his Motrin medication. (12(m), at ¶14). Antonelli failed to appear at the sick call for either August 13 or August 15, 1991. (*Id.* at ¶15).

On August 23, 1991, Antonelli again appeared at the sick call complaining of headache and neck pain. (12(m), at ¶16). A skull x-ray was taken; the results were negative. (*Id.*). Antonelli thereafter continually received tylenol, aspirin and/or motrin to control his headaches. These medications relieved his pain. (*Id.* at ¶17).

On September 9, 1993, Caridine confiscated some unknown legal and personal papers from Antonelli's locker. (12(m), at ¶18). Caridine advised Antonelli that the papers "were taken for investigation." (*Id.*). Antonelli testified that some of the confiscated papers were his personal papers, although he has not been able to identify what papers were taken. The remaining confiscated papers belonged to other inmates. (*Id.*).

On December 31, 1992, Antonelli filed an administrative tort claim with the Bureau of Prisons in which he claimed under the Federal Tort Claims Act that the medical care he

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ceived in August 1991 at the MCC was "superficial and untimely." (12(m), at ¶20). He failed to name any individuals who performed negligent acts and failed to state any factual basis for his negligence claim. (*Id.*).

II. Standards

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **Fed. R. Civ. Pro. 56(c)**; **Cox v. Acme Health Serv. Inc.**, 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-moving party, a reasonable jury could return a verdict for the non-movant. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); **Hedberg v. Indiana Bell Tel. Co., Inc.**, 47 F.3d 928, 931 (7th Cir. 1995). The movant has the burden of establishing that there is no genuine issue of material fact. **Celotex Corp. v. Catrett**, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). If the movant satisfies this burden, the non-movant must set forth specific facts which demonstrate the existence of a genuine issue for trial. **Fed. R. Civ. P. 56(e)**; **Celotex**, 477 U.S. at 324, 106 S. Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." **Celotex**, 477 U.S. at 322, 106 S. Ct. at 2552-53; **Waldridge v. American Hoechst Corp.**, 24 F.3d 918, 920 (7th Cir. 1994). A scintilla of evidence in support of the non-moving party's position is not sufficient to oppose successfully a summary

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judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." **Anderson**, 477 U.S. at 250, 106 S. Ct. at 2511. The court holds *pro se* prisoner litigants to the same substantive standards as other civil litigants when it decides a summary judgment motion. *See* **Kincaid v. Vail**, 969 F.2d 594, 600 (7th Cir. 1992), *cert. denied* 113 S. Ct. 1002 (1993).

III. Analysis

A. Count II: Deliberate Indifference to Medical Condition

Antonelli contends that Magnuson was deliberately indifferent to his medical condition because he told Magnuson during his intake interview that he was sick and that he needed to see a doctor. (Antonelli Dep., at 16-17). Antonelli specifically told Magnuson that a Deputy Marshal had pushed him off his feet and caused him to hit his head. When he tried to get up, he became very dizzy. (*Id.* at 17). Antonelli also told Magnuson that he felt like he had rocks inside his head and that he had vomited at both the Marshal's office and the MCC. (*Id.*). Antonelli contends that Magnuson did not take any action in response to his complaints of ill health, and that Magnuson commented that Antonelli was going to be "a thorn in my side." (*Id.* at 18, 16-17). Antonelli maintains that Magnuson should have gotten a doctor immediately. Antonelli further contends that Magnuson did not assist him in his efforts to get reassigned to a lower bunk even though he told Magnuson that getting into the upper bunk gave him a headache. (*Id.* at 20-23). Antonelli was eventually reassigned to a lower bunk, but it took "weeks." (*Id.* at 22).

Antonelli also contends that Caridine unconstitutionally denied him medical attention because he gave Antonelli "a hard time," "was plain ignorant," and did not explain to him

how to sign up for the sick call. (Antonelli Dep., at 25-26). Antonelli further contends that he missed many of the sick calls during his first few days at the MCC because nobody explained how the morning sick call operated. (*Id.* at 26-28).

Prison officials who are deliberately indifferent to the serious medical conditions of prisoners violate the Eighth Amendment prohibition against cruel and unusual punishment because their deliberate indifference constitutes an "unnecessary and wanton infliction of pain." **Estelle v. Gamble**, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976). Deliberate indifference may be manifested by prison doctors in their response to a prisoner's medical needs or by prison guards who intentionally deny or delay access to medical attention or intentionally interfere with the treatment once prescribed. **Id.** at 104-05, 97 S. Ct. at 291. Prison officials may thus violate a prisoner's eighth amendment rights by failing to "promptly and reasonably procure medical aid" for a prisoner who suffers a serious illness or injury." **Wood v. Worachek**, 618 F.2d 1225, 1233 (7th Cir.1980). The prisoner's medical condition or illness must be *serious* before such a failure can rise to the threshold of a constitutional violation. **Davis v. Jones**, 936 F.2d 971, 972-73 (7th Cir. 1991); **Matzker v. Herr**, 748 F.2d 1142, 1147 n.3 (7th Cir. 1984), *overruled in part on other grounds* **Salazar v. City of Chicago**, 940 F.2d 223, 240 (7th Cir. 1991).

"Deliberate indifference" to a prisoner's serious medical conditioners "is merely a synonym for intentional or reckless conduct." **Brownell v. Figel**, 950 F.2d 1285, 1290 (7th Cir. 1991) (citations omitted). Reckless conduct, in turn, is "used in the constitutional sense; that is, conduct that is so dangerous that the defendant's knowledge of risk can be inferred." **Id.** Only deliberately indifferent conduct can violate the eighth amendment: a prison's

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inadvertent failure to provide adequate medical care or a physician's negligent diagnosis do not satisfy the requisite culpable state of mind. *See* **Wilson v. Seiter**, 501 U.S. 294, 297, 111 S. Ct. 2321, 2323 (1991) (*citing* **Estelle**, 429 U.S. at 105, 106, 97 S. Ct. at 292); **Holmes v. Sheahan**, 930 F.2d 1196, 1200 (7th Cir.), *cert. denied* 502 U.S. 960, 112 S.Ct. 423 (1991).

Antonelli has failed to establish that any of the defendants acted with deliberate indifference to his self-proclaimed "serious" medical condition. The undisputed facts establish that Magnuson's alleged failure to request medical assistance for Antonelli is groundless. A physician's assistant examined Antonelli on the evening of August 2, 1991, within hours of his request for medical attention. Antonelli contends that the delay was too long, but has no factual basis to establish either directly or by inference that Magnuson was responsible for the delay or was deliberately indifferent to Antonelli's medical condition.[4] Antonelli complained to Magnuson that he had a headache and that he had vomited both at the Marshal's office and upon his arrival at the MCC. Nothing about Antonelli's self-described medical condition was objectively serious enough to warrant immediate medical attention, which the records of his examination on August 2, 1991, confirmed. *See* **Davis**, 936 F.2d at 972 (police officers must obtain medical attention for a pretrial detainee only when the injury objectively appears serious). In any event, Antonelli received medical attention within a reasonable period of time. *See* **Murphy v. Walker**, 51 F.3d 714, 717 (7th Cir. 1995) (two hour delay between the time the prisoner broke his hand and when he was

[4]Antonelli conceded in his deposition that he did not know what action Magnuson undertook to get him medical attention. (*Id.* at 19)

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taken to a hospital was not unreasonable).

In addition, Magnuson's failure to assign Antonelli to a non-existent lower bunk does not violate the eighth amendment, *see generally* **Harris v. Fleming**, 839 F.2d 1232, 1235-36 (7th Cir. 1988), particularly where, as here, the physician's assistant did not indicate that Antonelli's medical condition required a lower bunk berth.[5] Accordingly, Antonelli cannot establish that Magnuson was deliberately indifferent to his medical condition as a matter of law.

Antonelli's claim that Caridine was deliberately indifferent to his medical condition is also completely unfounded. When asked to identify what Caridine did or failed to do that deprived him of medical attention, Antonelli, in a very disjointed answer, could not identify any improper conduct by Caridine other than to state that Caridine gave him a "hard time" and was "plain ignorant." *See* Antonelli Dep., at 25-26. Antonelli's conclusory assertions fall leagues short of establishing that Caridine was deliberately indifferent to his medical condition. Antonelli's related assertion that Caridine failed to explain to him the sign-up procedure for the morning sick call also fails to establish that Caridine acted with deliberate indifference. The undisputed facts establish that Antonelli was first examined on the sick call on August 6, 1991; hence, any failure by Caridine to explain the sick-call procedure had to have occurred between August 2 and August 6, 1991. Yet, Antonelli did not establish that he spoke with Caridine during this time period, much less that he asked Caridine how the

[5]*See* Antonelli Dep., at 31-32, where he admitted that he did not ask the physician's assistant who treated him on August 2, 1991, for an order stating that he needed a lower bunk and in fact never received an order indicating that a lower bunk berth was medically required.

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sick call procedure worked and Caridine refused to explain it to him.

Accordingly, Antonelli cannot establish that Caridine or Magnuson were deliberately indifferent to his medical condition as a matter of law.

B. Count III: Seizure of Papers

In count III, Antonelli contends that Caridine seized certain papers from his locker in violation of his due process rights under the fourteenth amendment. As previously established, some of the papers belonged to another prisoner and the remainder were Antonelli's personal papers, although he cannot identify what papers were taken. The papers may have been Freedom of Information Act requests.[6] (Antonelli Dep., at 41, 43-46).

Caridine contends that Antonelli's due process rights were not violated as a matter of law because prison regulations provided a meaningful post-deprivation remedy that satisfied Antonelli's due process rights. *See* **Hudson v. Palmer**, 468 U.S. 517, 533, 104 S. Ct. 3194, 3203-04 (1984). More specifically, the prison regulations provide a prisoner with 120 days following seizure of an item during a shake-down to establish ownership of the item; if the prisoner establishes ownership and the item is not contraband, it will be returned to the prisoner. *See* Baete Aff., at ¶6. To that end, the defendants' contend that "[u]pon confiscating papers from Antonelli's locker, the BOP provided him with an inventory and notice that he had 120 days to establish ownership of the materials;" if he had done so, the materials would have been returned to him. (12(m), at ¶19). Caridine thus argues that Antonelli cannot establish a due process violation because he never exercised his rights under

[6]The legality of the seizure of the other inmate's papers is not at issue.

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the prison regulations.

The record does not establish, however, that Antonelli knew of this post-deprivation procedure. Although the 12(m) statement provides that the "BOP provided [Antonelli] with an inventory and notice," the portion of the record cited by the defendants as support for this statement fails to do so. The defendants cited paragraph 6 of Steve Baete's Affidavit,[7] which establishes only that the MCC has a procedure for affording post-deprivation relief. Baete's affidavit does not state that Antonelli was provided with an inventory of the seized articles or notice of the procedure; in fact, Baete properly concedes that he "was not the Chief Correctional Supervisor when Mr. Antonelli was incarcerated at MCC Chicago and was not involved with his alleged confiscation of legal materials." (Baete Aff., at ¶1). The defendants have not otherwise established that Antonelli was provided with an inventory of the seized papers and notice of the 120 post-deprivation recovery procedure. Moreover, Antonelli testified that Caridine never informed him of his rights under the applicable prison regulations despite his repeated requests to have his property returned. *See* Antonelli Dep., at 45. The defendants have likewise failed to establish that Antonelli knew or had reason to know of this prison regulation. Accordingly, this court cannot determine on the record before it whether the prison regulation provided a meaningful post-deprivation remedy that protected Antonelli's due process rights.

Caridine alternatively argues that Antonelli does not have a viable constitutional violation since he cannot establish any injury or damages resulting from the alleged violation. *See* **Niehus v. Liberio**, 973 F.2d 526, 531-32 (7th Cir. 1992) ("There is no tort without an injury . . . and this is true of constitutional as of ordinary torts.") (citations omitted). Caridine contends that Antonelli cannot establish damages because Antonelli never identified with particularity the legal papers that Caridine allegedly seized. The closest that Antonelli can come is that the papers were Freedom of Information Act requests, which Antonelli concedes he retyped and eventually litigated. (Antonelli Dep., at 46-47). This theory, however, is unavailing. If Antonelli's due process rights were violated, he sustained an injury.

In the absence of any objectively verifiable evidence that the defendants provided Antonelli with an inventory of the seized article and notified him of the post-deprivation recovery procedure, the questions as to whether Antonelli's due process rights were violated, the extent of his injury resulting from that violation and the compensation to be provided for that injury are to be determined by a jury.

C. Count VI: Negligent Medical Treatment

Finally, there are no facts that establish, either directly or indirectly, that the defendants either negligently denied Antonelli medical treatment or that the medical treatment he received was negligently provided. The record establishes that Antonelli received medical treatment for his alleged headaches and injuries on a number of occasions in August 1991. His pain was treated successfully with medications over time (the medication's failure to immediately relieve the pain does not, of course, give rise to a cognizable claim of negligent treatment) and cervical x-rays were normal.

Antonelli has not identified any improper treatment he received, except that he contends that the physician's assistant who examined him on August 2, 1991, should have

[7]Baete is the Chief Correctional Supervisor at the MCC. (Baete Aff., at ¶1).

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ordered cervical x-rays to rule out a concussion. Antonelli has not provided the court with any evidence or expert testimony to establish that such an examination was warranted in light of the symptoms of which he complained. In the absence of such testimony, this court will not assume the role of a physician to assess Antonelli's medical condition and determine what medical treatment was necessary and what was not. *See* **Coryell v. Smith**, 274 Ill. App. 3d 543, 653 N.E.2d 1317, 1320 (1st Dist. 1995) ("Expert evidence is required to support a charge of malpractice when the assessment of the alleged negligence required knowledge, skill, or training in a technical area outside the comprehension of lay persons."); **Saxton v. Toole**, 240 Ill. App. 3d 204, 210, 608 N.E.2d 233, 238 (1st Dist. 1992) ("In the absence of expert testimony that any act by the defendant could be said, within a reasonable degree of medical certainty, to have caused the plaintiff's injuries, it would be impossible for a jury verdict in plaintiff's favor to stand, and a directed verdict would be appropriate."). Antonelli has not otherwise produced any facts to establish, either directly or indirectly, that the prison physicians and physician's assistants negligently rendered medical treatment.[8] Accordingly, Antonelli cannot establish that the medical practitioners employed by the Bureau of Prisons committed malpractice as a matter of law.

Finally, Antonelli has not introduced any facts to establish, either directly or indirectly, that Caridine and Magnuson negligently denied him access to medical treatment. As previously established, Antonelli requested and received medical treatment on multiple occasions, including a medical examination within hours of his arrival at the MCC. The defendants are therefore entitled to summary judgment on Count VI as a matter of law.

WHEREFORE, for the foregoing reasons, the defendants' motion for summary judgment is granted with respect to Counts II and VI but denied with respect to Count III.

ENTERED:

David H. Coar
U.S. District Judge

Dated: December 1, 1995

[8]To establish a case of negligence in treatment against a medical provider, a plaintiff must prove (1) the proper standard of care against which the professional's conduct must be measured; (2) a negligent failure to comply with that standard; and (3) that the injury for which the suit is brought had as one of its proximate causes the negligence of the professional. **Borowski v. Von Solbrig**, 60 Ill. 2d 418, 423, 328 N.E.2d 301, 304-05 (1975); **Saxton v. Toole**, 240 Ill. App. 3d 204, 210, 608 N.E.2d 233, 238 (1st Dist. 1992). The burden is on the plaintiff to prove the cause of action of negligence, not on the defendant to disprove it. **Clingan v. Rakalla**, 252 Ill. App. 3d 786, 790, 624 N.E.2d 1, 3 (4th Dist. 1993); **Burgdorff v. IBM**, 74 Ill. App. 3d 158, 392 N.E.2d 183 (1st Dist. 1979).

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL ANTONELLI, Plaintiff,	)	
v.	)	No. 93 C 4385
OFFICER CARIDINE, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff Michael Antonelli has filed a ten count pro se complaint alleging deprivations of his civil rights (Count I), various violations of his constitutional rights (Counts II - V, and X), and four common law tort claims (Counts VI - IX), all arising out of plaintiff's confinement in 1991 at the Metropolitan Correctional Center ("MCC").[1] Defendants have filed a joint motion to dismiss plaintiff's complaint. For the reasons stated below, defendants' motion to dismiss is granted in part and denied in part.

BACKGROUND

On the afternoon of August 2, 1991, plaintiff was brought to the MCC on a parole violator warrant to be detained for a parole violation hearing. At that time, plaintiff alleges that he was injured from having been assaulted earlier that day by a U.S. Marshal at the federal building. Plaintiff states that he was visibly bruised and battered and had a laceration on the back of his head which was bleeding. Upon entering the MCC, plaintiff claims that he became extremely ill and repeatedly vomited. Plaintiff states that he was then put in a cell and did not receive medical attention for almost two weeks.

In addition, plaintiff claims that his constitutional rights were violated when prison employees interfered with some of his personal mail; seized his legal papers; and denied him a visit from his fiance.

ANALYSIS

I. Standard of Review

In ruling on a motion for dismissal, the court must presume all of the well-pleaded allegations of the complaint to be true. Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 2492 n.2 (1977). In addition, the court must view those allegations in the light most favorable to the plaintiff. Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987). Dismissal is proper only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

II. Personal Involvement

To be liable under 42 U.S.C. § 1983, a defendant must have some measure of personal responsibility for the alleged constitutional deprivation. Cygnar v. City of Chicago, 865 F.2d 827, 847 (7th Cir. 1989). "There is no doctrine of superior's

[1] In an order dated December 6, 1993, this court granted defendants' motion to substitute the United States as a defendant in plaintiff's common law tort claims contained in Counts VI - IX pursuant to the Federal Tort Claims Act.

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liability in § 1983 actions; instead, the official must actually have participated in the constitutional wrongdoing." Id. (citations omitted). "Failure to take corrective action cannot in and of itself violate § 1983." Soderbeck v. Burnett County, 752 F.2d 285, 293 (7th Cir.), cert. denied, 471 U.S. 1117, 105 S. Ct. 2360 (1985).

A supervisory official can be liable, however, even if not directly involved in the constitutional deprivation, if the official knowingly, willfully or recklessly caused the deprivation by his action or failure to act. Wilks v. Young, 897 F.2d 896, 898 (7th Cir. 1990). Supervisors who are merely negligent, or even grossly negligent, in failing to detect or prevent subordinates' misconduct are not liable under § 1983. Jones v. City of Chicago, 856 F.2d 985, 992-93 (7th Cir. 1988). The supervisor must know about the conduct and facilitate it, approve of it, condone it, or turn a blind eye to it. Id.

In this case, plaintiff does not make any allegations in his complaint to establish either direct or indirect personal involvement by defendant Calvin Edwards, Regional Director of the United States Bureau of Prisons, or defendants Page True or Mark Henry, who held the position of Warden at the MCC, in any of the alleged constitutional deprivations. Plaintiff's complaint contains no allegations from which the court can deduce that these defendants were aware of plaintiff's conditions of confinement or that they had an opportunity to correct the situation. Plaintiff's claims against defendants Edwards, True

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and Henry are made solely based on their supervisory positions within the Bureau of Prisons. Without any basis from which to infer that defendants Edwards, True or Henry were involved with plaintiff's care and custody, the court must dismiss plaintiff's constitutional claims contained in Counts II - V, and X as to defendants Edwards, True and Henry.

II. Conspiracy Claim

In Count I plaintiff alleges that the defendants engaged in a conspiracy to deprive him of his constitutional rights by threatening, harassing, and assaulting him in violation of 42 U.S.C. § 1985(3).[2]

Section 1985(3) creates a private cause of action for a conspiracy to deprive a person of equal protection of the laws or the right to vote. To state a claim under § 1985(3), a plaintiff must demonstrate that the conspirators' action was motivated by "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'" Bray v. Alexandria Women's Health

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[2] Section 1985(3) provides in relevant part as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner...the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against one or more of the conspirators.

42 U.S.C. § 1985(3).

same general conspiratorial objective or possessed the same motives." Id. (citing Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971)). Mere conclusory allegations that the defendants conspired to violate plaintiff's rights are insufficient.

In this case, plaintiff's complaint does not set forth any facts indicating a previous agreement between the defendants to harass or threaten plaintiff. Plaintiff's complaint contains no allegations from which this court can infer that the defendants engaged in a conspiracy to deprive plaintiff of his constitutional rights. Therefore, the court finds that plaintiff has failed to state a cause of action pursuant to 42 U.S.C. § 1985(3) for which this court could grant relief.

II. Constitutional Claims

A. Inadequate Medical Treatment Claim

Plaintiff alleges that on the afternoon of August 2, 1991, he was brought to the MCC on a parole violator warrant to be detained for a parole violation hearing. At that time, plaintiff claims that he was ill and injured due to having been allegedly assaulted earlier that day by a U.S. Marshal at the federal building. Plaintiff states that he was visibly bruised and battered and had a laceration on the back of his head which was bleeding. Upon entering the MCC, plaintiff claims that he became nauseous and repeatedly vomited. Plaintiff contends that despite his visible sickness and injuries, he was put into a cell and did not receive medical attention for almost two weeks.

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To establish deliberate indifference plaintiff must show that the defendants actually knew of the impending harm to plaintiff and refused to take steps to prevent it from occurring. Campbell v. Greer, 831 F.2d 700, 702 (7th Cir. 1987); Walton v. Fairman, 836 F. Supp. 511, 515 (N.D. Ill. 1993). Plaintiff's complaint contains no allegations indicating that any defendants, aside from John Magnuson and Officer Caridine, knew of plaintiff's head injury and resulting illness and refused to take steps to treat plaintiff. Therefore, the court dismisses Count II of plaintiff's complaint as to defendants Henry, Edwards, True, Quinlan, and Harris.[4]

B. Seizure of Legal Papers

In Count III plaintiff claims that defendant Caridine confiscated and seized plaintiff's legal papers in violation of plaintiff's constitutional rights.

1. Denial of Access to the Courts

Caridine was not served. The Seventh Circuit has held that the failure of the Marshal to effect service for an incarcerated plaintiff, coupled with the Marshal's failure to follow up with personal service, automatically constitutes "good cause" for Rule 4(j) purposes. Therefore, the defendants should be prepared to discuss at the next status hearing whether they will accept service on behalf of defendant Caridine or provide his last known address.

[4] In Count VI plaintiff alleges that defendants negligently denied plaintiff medical treatment. Because the court finds that plaintiff has alleged sufficient facts to establish that defendants Caridine and Magnuson acted with deliberate indifference to plaintiff's medical needs, plaintiff has clearly alleged a valid claim for negligent denial of medical attention by these same defendants. Therefore, the court grants defendants' motion to dismiss Count VI only as to defendants Henry, Edwards, True, Quinlan, and Harris.

"It is well-established that inmates have a fundamental constitutional right of access to the courts." Alston v. DeBruyn, 13 F.3d 1036, 1040 (7th Cir. 1994) (citing Bounds v. Smith, 430 U.S. 817, 821, 97 S. Ct. 1491, 1494 (1977)). "To prove a violation of the right of access to the courts, an inmate must show (1) the failure of prison officials 'to assist in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law,' Bounds, 430 U.S. at 828, 97 S. Ct. at 1498, and (2) 'some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and/or delay of the plaintiff's pending or contemplated litigation.'" Alston, 13 F.3d at 1040-41 (quoting Shango v. Jurich, 965 F.2d 289, 291 (7th Cir. 1992)).

In this case, plaintiff has failed to allege that defendant Caridine's alleged interference with plaintiff's legal papers resulted in the delay or interruption of any pending or contemplated litigation in which plaintiff was involved. See Jenkins v. Lane, 977 F.2d 266, 269 (7th Cir. 1992) (constitutional claim dismissed for failure to show that prison's policy of banning prisoners who were confined in protective custody from library prejudiced prisoner by causing a delay or interruption of pending litigation). Therefore, the court finds that plaintiff has failed to allege a violation of his right of access to the court based on the alleged seizure of his legal papers.

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2. Deprivation of Property Without Due Process

Although plaintiff has not sufficiently alleged a claim of the unconstitutional denial of access to the courts, the court finds that plaintiff has stated a valid due process claim in Count III based on the alleged seizure of his legal papers. It is beyond dispute that plaintiff has a protected property interest in the legal papers allegedly seized by defendant Caridine, and that the confiscation of plaintiff's property without "notice and an opportunity for hearing appropriate to the nature of the case" would violate plaintiff's due process rights. Caldwell v. Miller, 790 F.2d 589, 608 (7th Cir. 1986) (citations omitted). It is also beyond dispute, however, that the rights of an inmate "may be diminished by the needs and exigencies of the institutional environment." Wolff v. McDonnell, 418 U.S. 539, 555, 94 S. Ct. 2963, 2974 (1974). "[T]he due process rights of a prisoner are not absolute, but must be accommodated to the legitimate security needs of a corrections institution." Caldwell, 790 F.2d at 609.

In this case, plaintiff's complaint does not provide the court with factual details regarding the alleged seizure of his legal papers. Plaintiff simply claims that the confiscation and seizure of his legal papers by defendant Caridine violated plaintiff's constitutional rights. Therefore, the court is unable to determine at this stage of the case whether defendant Caridine's alleged seizure was reasonably related to a legitimate security consideration under the circumstances. However, reading

the complaint in the light most favorable to the plaintiff, as this court is required to do on a motion to dismiss, the court holds that plaintiff has adequately stated a due process claim against defendant Caridine.

C. Correspondence Claim

In Count IV plaintiff claims that his constitutional rights were violated when prison employees interfered with plaintiff's incoming and outgoing personal mail. Plaintiff alleges that several letters to and from his fiance were intercepted by the staff at the MCC.

A prison inmate has a constitutional right to be free from interference with his "privileged" mail, including communications from an inmate's attorney. See Wolff v. McDonnell, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985 (1974) (mail sent by an attorney to an inmate was privileged and could not be read by prison officials outside of an inmate's presence). "In general, privileged mail is defined as mail which is either sent to or received from attorneys or specified governmental and judicial officers. Non-privileged mail is, accordingly, comprised of all mail which does not fall within that definition." Gaines v. Lane, 790 F.2d 1299, 1302 (7th Cir. 1986). It is proper for prison officials to read non-privileged incoming mail in order to detect threats to jail security and to inspect for contraband. Id. at 1304 (citing Smith v. Shimp, 562 F.2d 423 (7th Cir. 1977)).

In addition, "'[B]ecause of their reasonable concern for prison security and inmates' diminished expectations of privacy,

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prison officials do not violate the constitution when they read inmates' outgoing letters.'" United States v. Whalen, 940 F.2d 1027, 1035 (7th Cir.), cert. denied, 112 S. Ct. 403 (1991) (quoting United States v. Brown, 878 F.2d 222, 225 (8th Cir. 1989)). Prison officials "are permitted to examine inmates' outgoing mail to ensure that the mail does not interfere with the orderly running of the prison, contains no threats, and does not facilitate criminal activity." Whalen, 940 F.2d at 1035.

Plaintiff does not allege that prison officials at the MCC interfered with any privileged mail. Plaintiff only alleges that several letters to and from his fiance were intercepted by the staff at the MCC. Because none of the incoming mail allegedly interfered with by prison employees was privileged, the court finds that plaintiff has failed to state a cognizable constitutional claim.[5]

D. Denial of a Visit

Plaintiff alleges in Count V that defendant Harris violated plaintiff's constitutional rights by failing to allow plaintiff's fiance to visit plaintiff at the MCC. The Supreme Court held in Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 461, 109 S. Ct. 1904, 1909 (1989), however, that the "denial of prison access to a particular visitor 'is well within the terms of

[5] Plaintiff alleges in Count VIII a claim for negligent transmission of the mails pursuant to the Federal Tort Claims Act ("FTCA"). The Untied States is entitled to immunity under the FTCA, however, for any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters. 28 U.S.C. § 2680(b). Therefore, Count VII of plaintiff's complaint must be dismissed.

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confinement ordinarily contemplated by a prison sentence,' and therefore is not independently protected by the Due Process Clause." Id. (quoting Hewitt v Helms, 459 U.S. 460, 468, 103 S. Ct. 864, 869 (1983)). Therefore, the court dismisses Count V for failure to state a claim.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART. Plaintiff's complaint is dismissed in its entirety as to defendants Edwards, True, Henry, Quinlan and Harris. Counts I and VI remain as to defendants Magnuson and Caridine, and Count III remains as to defendant Caridine. The remaining defendants are ordered to Answer the respective remaining counts of the Complaint on or before October 21, 1994. The parties are strongly urged to discuss the settlement of this case and report on the status thereof on October 26, 1994 at 10 a.m. Pro se plaintiff Antonelli and defendants' counsel are ordered to attend at that time.

ENTER:

James F. Holderman

JAMES F. HOLDERMAN
United States District Judge

DATED: September 22, 1994

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